No. 77-1081

In the Supreme Court of the United States

OCTOBER TERM, 1977

ADOLPH H. KNEHANS, JR., PETITIONER

v.

CLIFFORD L. ALEXANDER, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-31a) is reported at 566 F. 2d 312. The opinion of the district court (Pet. App. 1a-13a) is reported at 403 F. Supp. 290.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on October 3, 1977. A timely petition for rehearing was denied on November 3, 1977 (Pet. App. 34a). The petition for a writ of certiorari was filed on January 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was discharged from the Army in violation of 10 U.S.C. 3303(d).

2. Whether the decision of the Army Board for the Correction of Military Records not to grant relief to petitioner was arbitrary and capricious.

STATEMENT

Petitioner, while a major in the Army, was twice passed over for promotion by Army selection boards, making him subject to mandatory discharge. 10 U.S.C. 3303(d). Petitioner filed an appeal, contesting the placement in his file of an adverse Officer Efficiency Report (OER). The appeal was successful and the report was removed from petitioner's records, because petitioner had not served for at least 90 days under the supervision of the rating officer (Pet. App. 2a). A Standby Advisory Board, created by the Secretary of the Army to reconsider the promotion of officers whose other selection procedures were flawed, then considered petitioner for promotion on the basis of his corrected file but did not recommend his promotion (*ibid.*).

Petitioner filed suit in the United States District Court for the District of Columbia, asking the district court to vacate the selection boards' decisions and to order him reinstated while the Army resubmitted his case to the next two selection boards convened. The district court held that petitioner must exhaust his administrative remedies

by filing an application with the Army Board for the Correction for Military Records (ABCMR);[1] it remanded the case to the ABCMR (Pet. App. 3a).[2]

The ABCMR denied petitioner's application for relief on the ground that " 'insufficient evidence has been presented to indicate probable material error or injustice' " (Pet. App. 2a), and the case was returned to the district court. The district court granted summary judgment for the Army, holding that the ABCMR had not acted arbitrarily and capriciously. The court concluded that petitioner's file "even * * * as defectively constituted still 'fairly portrayed' [petitioner's] record" (*id.* at 9a) and that the record before the court "does not support the contention that the two non-selection decisions were caused by the negative OER" (*ibid.*). The court explained that "in the absence of evidence that inclusion of the negative OER necessarily caused the non-promotion decisions, this court cannot say that the ABCMR's refusal to reverse those decisions was without a rational basis" (*id.* at 10a).

A divided panel of the court of appeals affirmed, holding that because the ABCMR has "sufficient authority to provide the relief [petitioner] now seeks" (Pet. App. 19a), petitioner must show that its decision not to reinstate him was arbitrary, capricious or otherwise unlawful. "The district court concluded that he had failed to sustain his burden of proof in this regard," said the court, "and we fully agree" (*id.* at 20a).

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[1]The ABCMR is a board of civilians established by the Secretary of the Army pursuant to 10 U.S.C. 1552 to "correct any military record * * * when * * * necessary to correct an error or remove an injustice." The ABCMR had authority to grant petitioner full relief (Pet. App. 5a-6a, 19a).

[2]Petitioner's request for an order temporarily restraining the Army from discharging him was denied, and petitioner was discharged.

ARGUMENT

1. It has been the consistent policy of the federal courts to leave internal military decisions undisturbed, absent a showing of significant illegality. *Schlesinger* v. *Ballard*, 419 U.S. 498; *Gilligan* v. *Morgan*, 413 U.S. 1; *Orloff* v. *Willoughby*, 345 U.S. 83. Promotion decisions are particularly inappropriate for judicial oversight. *Mindes* v. *Seaman*, 501 F. 2d 175 (C.A. 5); *Payson* v. *Franke*, 282 F. 2d 851 (C.A. D.C.), certiorari denied *sub nom. Robinson* v. *Franke*, 365 U.S. 815. Petitioner has not demonstrated that the inclusion of one particular OER in his file—an inclusion improper only because the reviewing officer had not been his superior officer for the required 90 days—so infected the selection process with error that the courts must intervene.[3]

As the court of appeals correctly held, there is no statutory or regulatory requirement that a selection board review a perfectly constituted file. The actions of a military promotion board have been held invalid only where the board was illegally constituted and thereby lacked jurisdiction over the matter. See *Ricker* v. *United States*, 396 F. 2d 454 (Ct. Cl.). If the board is properly constituted, and the documents it possesses are "substantially complete, and * * * fairly portray the officer's record" (*Weiss* v. *United States*, 408 F. 2d 416, 419 (Ct. Cl.)), the officer has received his due. The district court and the court of appeals found that petitioner's file met this test, and there is no reason for this Court to review that essentially factual conclusion.

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[3]Both the district court and the court of appeals rejected petitioner's constitutional arguments, which he does not press here (Pet. App. 10a-12a, 16a-17a).

Petitioner's argument (Pet. 13-16) that the selection boards' proceedings are vitiated because the presence of the invalid OER violated the Army's own regulations is insubstantial. Petitioner focuses exclusively on paragraph 17 of Army Regulation 624-100, which describes documents to be included before the selection boards, and ignores paragraph 19 of the same regulation, which provides (Pet. App. 18a):

> Selection board action is administratively final. Reconsideration for promotion will be afforded only in those cases where material error was present in the records of an officer when reviewed by a selection board. This determination will be made by Headquarters, Department of the Army.

The Secretary of the Army created a Standby Advisory Board to evaluate corrected files in cases such as petitioner's. Petitioner's corrected file was reconsidered by the Standby Advisory Board. That board declined to recommend him for promotion. The procedures followed in petitioner's case therefore conformed to Army regulations, and petitioner's discharge was valid. The court of appeals properly concluded that the original "oversight" in this case did not amount to a violation of either statute or regulation and was not sufficiently prejudicial to justify departure from the established judicial policy of non-interference with "personal matters better left in most cases to the discretion of the military * * *" (Pet. App. 17a-18a).

Petitioner is incorrect in his contention (Pet. 14-16) that the decision here conflicts with decisions of the Court of Claims. In *Weiss* v. *United States, supra*, the Court of Claims held that the Navy's reversal of the decision of its Board for the Correction of Naval Records was arbitrary and capricious because the undersecretary improperly

relied on the advice of the Judge Advocate General of the Navy, in violation of the requirement of 10 U.S.C. 1552 that a service secretary "act through" civilian boards to correct records.[4] In *Yee* v. *United States*, 512 F. 2d 1383 (Ct. Cl.) and *Duhon* v. *United States*, 461 F. 2d 1278 (Ct. Cl.), the correction boards permitted undisputedly prejudicial error to remain uncorrected. But the "oversight" in the present case was corrected promptly when the Army voided and removed the objectionable OER from petitioner's file; no admittedly prejudicial error has gone uncorrected.

2. Finally, petitioner argues (Pet. 19-20) that the ABCMR's failure to make formal "findings of fact or [give any] statement of reasons" renders its decision arbitrary and capricious.

This contention is raised for the first time before this Court and for that reason should not be considered. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16. See also *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 6; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2. No exceptional circumstances in this case justify review. Army regulations in effect at the time of petitioner's application for relief provided that a written statement of the reasons for decision and the facts relied upon were not required whenever relief was denied without a hearing, as occurred in the instant case. 32 C.F.R. 581.3(c)(iii)(1976).[5]

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[4] *Weiss* stated standards for the review of contents of the files before selection boards. For the reasons given above and at Pet. App. 6a-9a, the file in petitioner's case was not inadequate under those standards.

[5] The regulations have been changed; effective April 1, 1977, 42 Fed. Reg. 17441, on every application denied with or without a hearing, the determination of the Board "shall be made in writing and include a brief statement of the grounds for denial." 32 C.F.R. 581.3(c)(5)(iv)(1977). The fact that the regulations were revised

The Administrative Procedure Act requires a written statement of "findings and conclusions, and the reasons or basis therefore" (5 U.S.C. 557(c)(3)(A)), only for rulemaking proceedings (see 5 U.S.C. 553) and adjudications "required by statute to be determined on the record after opportunity for an agency hearing" (see 5 U.S.C. 554(a)). The statutory requirement of formal findings does not apply here because the ABCMR is not required by statute to provide applicants with an opportunity for a hearing. See 10 U.S.C. 1552.

This Court has not required detailed findings of fact and conclusions of law unless required by statute or regulation, or unless effective judicial review would be impossible in their absence. See *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 191-192; *Camp* v. *Pitts*, 411 U.S. 138; *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402.

At all events, the ABCMR did provide a reason for its decision—that " 'insufficient evidence has been presented to indicate probable material error or injustice' " (Pet. App. 2a). Although brief, the explanation states the reason for the action taken and is tantamount to a finding that the invalid OER was not a significant factor in the selection boards' decisions to pass over petitioner for promotion.[6]

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renders petitioner's arguments regarding the need for this Court to "settle the procedures that must be followed to establish a fair and equitable procedure for promotion and elimination" (Pet. App. 13) even less compelling; whatever difficulties flowed from a lack of stated reasons will not arise in the future.

[6] Petitioner also contends that "it was not the business of the District Court to review petitioner's Army record or to render a judgment as to whether or not petitioner merited a promotion" (Pet. 18). In applying the arbitrary and capricious standard, however, this Court has stated that the administrative record is "the focal point for judicial review * * *." *Camp* v. *Pitts*, *supra*, 411 U.S. at 142.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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